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No. 91-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

RALPH W. HOLMEN
Counsel of Record
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION
OF REALTORS®

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER*

INTEREST OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of approximately 750,000 persons engaged in all phases of the real estate business.

* All parties of record in this case have consented pursuant to Supreme Court Rule 36.1 to the filing of this *amicus curiae* brief in support of Petitioner. These consents are filed herewith.

NAR was created in 1908 to promote and encourage the highest and best use of land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in matters of concern to property owners for over three quarters of this century. Of the issues which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

At stake in this case is the vitality of the protection afforded property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the uncompensated "taking" of property and the corresponding rights and benefits of property ownership. The decision below, unless remedied by this Court, will substantially if not entirely undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is well-positioned to recognize the gravity of this threat. NAR's members, who are involved in upwards of 80% of real property resale transactions, span the nation. Particularly interested in this case are those members of NAR in coastal areas, who are seriously concerned about the debilitating effect of the decision below on property rights and values in their areas, and on the right of their

clients and customers owning or purchasing coastal properties to enjoy the fruits of their investments. The comprehensive involvement of NAR and its members in land development, investment and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of constitutionally protected property rights.

NAR does not propose to duplicate the legal arguments presented in the Petitioner's brief, but rather endorses and urges to this Court the Statement of the Case and legal arguments set forth in therein. The purpose of NAR in submitting this brief *amicus curiae* is to add the voices of the hundreds of thousands of NAR members and the millions of American property owners they serve to the chorus of others concerned with the dangerously limiting construction of the Fifth Amendment's guarantee of private property rights articulated by the court below.

SUMMARY OF ARGUMENT

The Fifth Amendment's guarantee that private property shall not be taken without payment of just compensation is unqualified and absolute. This Court has occasionally condoned regulation which prohibited particular uses of property found detrimental to the public health, safety or welfare. Such regulation has been tolerated, despite the Fifth Amendment's guarantee, on the premise that it is necessary to prevent a public injury which the property owner is without an inherent right to cause. In the case of challenges to regulation which wholly eliminates all use of property in the name of preventing such nuisance-like activities, however, this Court should require a high level of scrutiny to be exercised. This more demanding analysis

is necessary to confirm objectively that the nuisance purportedly caused by use of the property is genuine, substantial and legitimate, not simply an economic concern, and that other useful or economically beneficial uses are not also proscribed.

ARGUMENT

I. The Fifth Amendment Unequivocally Requires Just Compensation To Be Paid

This case raises the question of the scope of protection afforded property owners by the Just Compensation Clause of the Fifth Amendment, which provides that ". . . (P)rivate property shall not be taken for public use, without just compensation." U.S. Const., Amendment V. NAR urges this Court to prevent emasculation of that protection by condemning judicial deference to the claim that a severe restriction on land use is necessary to serve the public interest or prevent a public injury.

The Just Compensation Clause has obvious application to the sovereign's exercise of the power of eminent domain. Beginning with this Court's seminal decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), however, it has been understood that land use regulation that "goes too far" may also result in a compensable taking. 260 U.S. at 415. A substantial body of jurisprudence of both this Court and lower Federal and state courts have wrestled with the implications of this pronouncement. Much of this litigation has focused on the question of how much a land use regulation must diminish an owner's property interests and rights to constitute a "taking" requiring compensation. Although various tests have been

formulated for making that determination, *see Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), this Court has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." *Penn Central*, at 124. Nevertheless, the dictate of the Fifth Amendment is clear, and absolute: When a taking (however defined and determined) occurs, the Constitution guarantees the owner the right to receive compensation. *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987), citing *Jacobs v. United States*, 290 U.S. 13, 16 (1933). *First English* even made it clear that this requirement extends so far as to include property taken for only a temporary period. In such circumstances, this Court has declared that compensation is due for the period during which the owner's property rights were denied. No qualification or condition applies to government's obligation to pay compensation for the regulatory taking of property.

II. The Decision Below Improperly Enlarges the Scope of This Court's Prior Application of the "Nuisance Exception"

A. This Court's Use of the Nuisance Exception

Despite the unconditional language of the Just Compensation Clause, this Court has held that in some circumstances particular uses of property may be prohibited without invoking the government's obligation to pay compensation. In cases such as *Mugler v. Kansas*, 123 U.S. 623 (1887), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Miller v. Schoene*, 276 U.S. 272 (1928), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and most recently, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S.

470 (1987), this Court declined to find a compensable taking of property rights even though specific uses of property were forbidden. This Court reached that result by holding that the particular uses were offensive, injurious or noxious to the public health, safety or well-being, and that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler*, 123 U.S. at 665. In *Keystone*, this Court went on to explain that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." 480 U.S. at 491, n.20. In *First English*, this Court also suggested that the conclusion that a compensable taking had occurred might be avoided by "establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 482 U.S. at 313. Put in terms of the familiar "bundle of rights" analogy of property ownership, this logic infers that the use of property in a particularly injurious manner is not a strand which is within the bundle at all, so no right is taken when one is denied the opportunity to use the property in that fashion.

As Chief Justice Rehnquist pointed out in his dissent in *Keystone*, however, this Court's application of the "nuisance exception" to the Constitutional guarantee of compensation for the taking of property has heretofore been confined to cases where the prohibited uses were discrete and narrow, and other non-noxious uses presumably remained available to the property owner.[1] Accordingly, the

[1] *Keystone*, 480 U.S. 470, 513 (Rehnquist, J., dissenting). The one possible exception to this is the *Keystone* case itself, where the

(Footnote continued on following page)

results in these cases probably could be justified on the alternative basis that the property rights of the owners were not sufficiently diminished to constitute a taking of the property. Since only specific uses of their properties had been forbidden, the owners did not and probably could not have shown that they had been wholly denied "economically viable use of (the) land," *Agins*, 447 U.S. at 260, so that it could be said that no taking occurred for that reason as well. In *Keystone* this Court did, in fact, expressly articulate that alternative basis for its conclusion that no taking occurred. 480 U.S. 470, 493.

B. Use of the Nuisance Exception by the Court Below

In the present case, Petitioner is precluded from using his property in a manner which is neither narrow nor discrete, but which is sweeping and broad. Petitioner's complaint alleged that the building prohibition of the Beachfront Management Act denies him all economically viable and beneficial use of his property and renders it valueless. The trial court, in a finding undisturbed by the South Carolina Supreme Court, agreed. Thus, the South Carolina Supreme Court's application of the "nuisance exception" principle in this case is, contrary to the court's claim, much more than a "straightforward" application of the doctrine heretofore employed by this Court. The result reached below is an inappropriate and Constitutionally unacceptable extension of this Court's decisions employ-

[1] *continued*
majority held the nuisance principle applicable but also held that a taking had not occurred because not all use of the property at issue had been taken. The dissent took the position that all interest in and use of *particular* coal deposits had, in fact, been eliminated, so that "all use" of the property, so defined, had been eliminated.

ing the "nuisance" analysis to a circumstance where regulation eradicates all rights of use of a property.

This Court should condemn such an expansive interpretation of the nuisance rule. Where regulation produces complete extinction of an owner's right to use and enjoy his property in *any* useful fashion, the Fifth Amendment unequivocally requires compensation to be paid. If the government advances the justification that the prohibition is necessary to prevent property use which will cause a serious injury to the public weal, that explanation should be subjected to vigorous and comprehensive scrutiny to verify its legitimacy. The payment of just compensation required by the Fifth Amendment may be denied if, but only if, the regulation survives such analysis. The court should objectively confirm that the uses prohibited by the regulation are, in fact, truly noxious and therefore *not* strands within the owner's "bundle of rights."

There may be few ordinances which so comprehensively deny property use as to merit such extraordinary scrutiny, although the present case certainly appears to present a strong candidate for such analysis. Of those, there may be even fewer which need be that broadly restrictive in order to remedy effectively a legitimate social evil. In those rare instances, denial of compensation may be warranted. The covenant of the Just Compensation Clause, however, demands zealous efforts by courts to safeguard property owners from unwarranted and uncompensated regulatory appropriation of their property rights.

III. Heightened Scrutiny of Regulatory Takings is Necessary When All Uses of Property Are Eliminated

A. Why Close Scrutiny is Required

In addressing the question of when, if ever, and under what circumstances land use regulation may eradicate all beneficial uses of property without invoking the government's obligation to pay compensation, two considerations discussed above provide the appropriate foundation for analysis. First, because governmental action which constitutes a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation," *First English*, 482 U.S. 304, 315, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960), courts must be keenly sensitive to the draconian nature of regulation resulting in uncompensated elimination of all right to use and enjoy a particular property. Such radical action is wholly abhorrent to the Fifth Amendment's otherwise inviolate guarantee. In order to fulfill the Fifth Amendment's promise of the right to enjoy property rights free of excessive governmental restriction, courts should be meticulously hostile, rather than deferential and accommodating, to regulations which effect broad restraints on property rights. Thus, a court's review of comprehensively restrictive land use regulations should be based on a predisposition *against* the validity of such ordinances and *towards* protection of the owner's rights as secured by the Fifth Amendment.

Second, as explained above, the rationale for the conclusion that the nuisance exception applies in certain cases is that the regulation does not take an inalienable right of the property owner because the proposed use is so noxious that it is not one to which the owner is entitled. In addition, in many and perhaps even most nuisance cases, only a few discrete uses are proscribed, so that the regulation may elude characterization as a taking because not

all use of the property is prevented. Other non-noxious and economically viable uses remain available to the property owner.

As a result, it may be sufficient to examine narrow and specific land use restrictions with the measure of exactitude prescribed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that is, to determine whether the regulation "substantially advances" a legitimate state interest. The familiar "rational relationship" test of due process analysis may also be adequate. In either case, a less demanding inquiry may be warranted because there exists the alternative basis for the conclusion that no taking has occurred, since not *all* uses (and thus presumably not all "economically viable" uses) are prohibited.

But, where, as in the present case, the regulation is so encompassing as to forbid all reasonably available and viable uses of the property, the rights guaranteed by the Fifth Amendment are grievously imperiled. The owner is deprived of the opportunity to use, enjoy and benefit from his property in any manner whatsoever. The threat of such wholesale destruction of property rights requires that extraordinary care be exercised to insure that the Constitutional guarantees retain vitality and meaning. The government should thus be obliged to carry a weighty burden to clearly and unequivocally substantiate the denial of compensation by establishing beyond doubt that the regulation is necessary to, and does in fact, eliminate *only* those uses of the property so inimical to the public well-being that they cannot be said to be "rights" of the owner. Correspondingly, courts reviewing such regulations must exercise a substantially elevated level of scrutiny to validate the applicability of the nuisance exception and its underlying rationale.

B. Elements of the Close Scrutiny Analysis

The enhanced level of inquiry of regulation producing a total deprivation of property use should incorporate several concerns. First, as in the case of regulations with a less pervasive impact on the owner's opportunity to use his property, the court should confirm that the objective and effect of the regulation is not simply to confer on the public a desirable benefit at the expense of the owner's opportunity to enjoy his property rights, but to avoid a genuine threat of injury to public health, safety or welfare.

Second, the regulatory purpose and the public injury to be thereby averted should be carefully and independently assessed and verified by the court to be, as this Court described the legislative purpose of the statute at issue in *Keystone*, "genuine, substantial and legitimate. . .," 480 U.S. at 486. Similarly, the court must conclude that the injury is one which would inevitably result from the proposed property use. The court should not deferentially accept the assertions of the legislative or regulatory body adopting the regulation, but must require that the threat of injury, and the prophylactic effect of the regulation's limitations on property use, be justified by facts, data and reasoned and sound conclusions drawn therefrom. The court should not hesitate to evaluate independently and objectively such data to determine whether the use presents a legitimate threat of public harm. The court should further establish that the threatened harm is a substantial one, rather than a minor annoyance to the community.

Third, the public injury to be prevented by application of the regulation at issue must not be one which is simply deleterious to the economic well-being of the public, but rather one which presents a significant threat of physical harm to persons or private or public property. In

striking the appropriate balance between protection of public interests and invasion of the ordinarily inviolate right of property owners to be free from uncompensated appropriation of their property, the property owner should not be obligated to carry the economic welfare of the community on his back. See *Keystone*, 480 U.S. 470, 513 (Rehnquist, J., dissenting).

Finally, the court should carefully evaluate the scope of the regulation to insure that it is no more encompassing than absolutely necessary to circumvent the substantial public injury which is threatened. Since the proscriptions of certain uses of the property may be tolerated only because such uses are harmful to the public well-being, and are therefore not uses to which the owner can claim a right, that justification does not apply to other non-injurious uses also within the owner's "bundle of rights." Thus, other non-harmful uses should not and may not also be prohibited. This consideration may also cause regulators to exercise restraint in regulating or prohibiting property uses which may threaten public harm if they come to recognize that unduly broad restrictions are likely to be stricken, or invoke the obligation to pay just compensation, as intolerably invasive of the rights of property owners.

This intensified inquiry into whether the nuisance principle genuinely applies is necessary to prevent the nuisance principle from becoming the exception that engulfs the rule. As this case itself makes clear, land use regulators have begun to learn the lessons of *Mugler* and its progeny, including *Keystone*: a simple declaration that regulation is necessary to prevent property use contrary to the public well-being may avoid the requirement that compensation be paid for depriving an owner of the use of

his property. There are, to be sure, legitimate and significant public interests that merit protection. Property owners have no inherent right to use their property in ways which are likely to result in a variety of *bona fide* social evils, such as pollution of public water supplies or the air breathed by all, or subjecting citizens to the threat of exposure to radioactive or other hazardous materials. But where the property owner loses all value of or opportunity to use his property in an economically viable fashion, the Just Compensation Clause of the Fifth Amendment entitles the affected property owner to no less than a court's vigorous and painstaking efforts to verify that the regulation is narrowly circumscribed to prohibit only uses to which the owner has no inherent right or entitlement.

CONCLUSION

The decision of the South Carolina Supreme Court employs a formulation of the nuisance principle which will permit land use regulators to expeditiously emasculate the promise of the Fifth Amendment that property rights may not be taken without compensation. Should this Court decide to allow all beneficial use and enjoyment of property to be denied in certain limited circumstances to prevent a substantial and legitimate injury to the public, it should also require lower Federal and state courts to

undertake a demanding analysis of that justification of the usurpation of Constitutionally protected property rights.

Respectfully submitted,

RALPH W. HOLMEN
Counsel of Record
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION
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